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No. 91-42

# In the Supreme Court of the United States

OCTOBER TERM, 1991

UNITED STATES OF AMERICA, PETITIONER

*v.*

THERESE A. BURKE, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

KENNETH W. STARR
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 514-2217*

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Respondents have offered untenable factual theories and erroneous legal analyses to support their contention (Br. in Opp. 6-10) that the decision below does not conflict with *Thompson* v. *Commissioner*, 866 F.2d 709 (4th Cir. 1989), and with *Johnston* v. *Harris County Flood Control District*, 869 F.2d 1565 (5th Cir. 1989), cert. denied, 493 U.S. 1019 (1990).

1. Respondents claim that the income they received in settlement of their Title VII sex discrimination claims represents an award of "litigation benefits" rather than an award of "back pay" (Br. in Opp. 9). This alleged factual distinction is without substance.

The "litigation benefit" that was sought in the Title VII sex discrimination case was an "order awarding back pay to all affected female employees" (Pet. App. 3a, 22a). The only "litigation benefit"

that respondents *could* properly have obtained in the form of a monetary recovery under Title VII was an award of "back pay." See, *e.g.*, *Walker* v. *Ford Motor Co.*, 684 F.2d 1355, 1363-1364 (11th Cir. 1982) (general compensatory and punitive damages are not available under Title VII); Pet. 12-13. Respondents thus received precisely the "litigation benefit" that they sought: an award of "back pay."

2. Respondents similarly err in claiming that *Johnston* v. *Harris County Flood Control District*—in which the Fifth Circuit held that a recovery of back pay under Title VII "is not tax-exempt" (869 F.2d at 1580)—"has little relevance" to this case (Br. in Opp. 10). As respondents correctly observe (*ibid.*), *Johnston* involved a judicial determination of a Title VII back pay claim rather than a voluntary settlement of one. Respondents are clearly incorrect, however, in suggesting that this purported distinction makes *Johnston* of "little relevance" (*ibid.*). The tax treatment of a recovery for "personal injuries or sickness" under Section 104(a)(2) depends on the nature of the claim, not on whether the recovery is awarded by a court or paid pursuant to a voluntary settlement agreement. By its very terms, Section 104(a)(2) applies to "damages received (*whether by suit or agreement* * * *) on account of personal injuries or sickness." 26 U.S.C. 104(a)(2) (emphasis added). Respondents' proposed distinction of *Johnston* as a case involving a "trial court [determination of] the amount of back wages" instead of a "settlement" (Br. in Opp. 10) simply ignores the plain language of the statute.

3. In attempting to distinguish *Thompson* v. *Commissioner*, respondents claim that *Thompson* was "essentially" about back pay awarded under the Equal Pay Act and involved no "probing consideration" of



the tax treatment of back pay awarded under Title VII (Br. in Opp. 7). Respondents hypothesize that the *Thompson* court's failure to give a "probing consideration" of the income tax treatment of back-pay recoveries under Title VII occurred because it "was only coincidental" that the Equal Pay Act violation in *Thompson* "also happened" to be a violation of Title VII (Br. in Opp. 7).

We do not agree that the holding of the court of appeals in *Thompson* was the result of either coincidence or judicial carelessness. Nor do we agree that respondents have offered a "fair reading" (Br. in Opp. 7) of that decision. To the contrary, the Fourth Circuit observed in no less than *five* separate passages that *Thompson* involved back pay awarded under *both* Title VII and the Equal Pay Act (866 F.2d at 710-711). Having noted that back pay under *both* statutes was involved, the court then concluded generally that "the claim for back pay was essentially a contractual claim for accrued wages" and was therefore not excluded from income by Section 104(a)(2). *Id.* at 712.

Like Judge Wellford in his dissent in this case, we believe that *Thompson* offered a "better reasoned analysis" (Pet. App. 16a) of the proper tax treatment of back-pay recoveries under Title VII. Whether or not one agrees that *Thompson* correctly decided this issue, however, what is clear is that *Thompson did* decide this issue. Respondents simply err in contending to the contrary.

4. Finally, without even considering the seventy-five-year-long history of administrative interpretation of Section 104(a)(2)—which is recounted in some detail in the petition (Pet. 6-10)—respondents erroneously claim (Br. in Opp. 12-16) that the government's position in this case is foreclosed under

Treasury regulations that interpret the statute to exclude from income any recovery of damages for personal, "tort type" injuries. See Treas. Reg. § 1.104-1(c). While respondents' argument is not convincing for reasons discussed in the petition (Pet. 6-16 & n.10), it suffices here to note that the Internal Revenue Service has long interpreted this regulation to be inapplicable to statutory "back pay" remedies because they are contract-like, rather than "tort type," claims. See Pet. 11 (citing Rev. Rul. 72-341, 1972-2 C.B. 32 (Title VII back pay award is includable in gross income); Rev. Rul. 75-64, 1975-1 C.B. 16 (same for NLRB back-pay award); Rev. Rul. 72-268, 1972-1 C.B. 313 (same for Fair Labor Standards Act back-pay award)). This Court has often held that the agency's interpretation of its own regulation is the "ultimate criterion" for its proper application and is entitled to "controlling weight" where "the meaning of the words used [in the regulation] is in doubt" (*Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)). See also *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 538 n.29 (1982) ("In construing regulations, the Court normally defers to the agency's interpretation."); *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980) (agency interpretation of its own regulation upheld "[u]nless demonstrably irrational").

The court of appeals improperly disregarded this settled principle in discounting the agency's long-standing interpretation of its regulation.* Because

* We acknowledge that the reference in this regulation to "tort type remedies provides little concrete guidance to the courts. It does little to embellish the language of the statute itself, which excludes damages received for "personal injuries or sickness" from income (26 U.S.C. 104(a)(2)). Our point is not that the regulation is dispositive of the issues in this case but that the court below erred in purporting to *apply* this regulation while choosing to *ignore* the agency's long-standing interpretation of the regulation (see Pet. App. 5a, 8a-10a). This aspect of the decision below quite directly conflicts with this Court's decisions in *Bowles*, *North Haven* and *Ford Motor Credit*.



the decision below conflicts both with the agency's settled interpretation of its regulation and with the interpretation of Section 104(a)(2) that has been adopted by other courts of appeals, the tax treatment of back-pay awards received under a broad variety of federal and state statutes will remain subject to continuing uncertainty and disparate treatment in the absence of a decision by this Court.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

KENNETH W. STARR
*Solicitor General*

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